APPENDIX

No. 18,041

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOUISE M. SCUDDER, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ON PETITION for Review of a Decision of the Tax Court.

Decided December 30, 1968.

OPINION—Decided and Filed December 30, 1968.

Before: O'SULLIVAN and MCCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

O'SULLIVAN, Circuit Judge. This case presents the petition of Louise M. Scudder for review of a decision of the tax Court—Louise M. Scudder, 48 T.C. 36 (1967)—whereby she was held liable for $155,500.17 in income tax deficiencies and $82,446.84 in fraud penalties thereon. This judgment was entered upon the claim that Louise's husband had fraudulently omitted from their joint tax returns for the years 1954-1958 the sum of $281,665.84 (and some smaller sums) which he had allegedly embezzled from her and her five sisters—partners, owning the Owensboro Liquor Company of Owensboro, Kentucky. The husband, Frank Scudder, was the manager of the partnership during the time involved, apparently without any definition of or limitation

upon his authority as such.[1] His unauthorized withdrawals from the partnership were as follows:

1954	$ 71,025.28
1955	83,768.70
1956	56,293.97
1957	33,514.65
1958	37,063.24
	$281,665.84

Other items of income not reported in the joint returns were monies received by the husband from enterprises in which he had an interest, in the amount of $8,188.92, and withdrawals from the partnership of fictitious travel expenses in the amount of $22,100.

On April 13, 1962, the Commissioner issued a notice of deficiency against petitioner and her husband in the following amounts:

Year	Deficiency	Fraud Penalty
1954	$42,718.41	$21,359.21
1955	52,842.54	26,421.27
1956	23,868.98	16,631.23
1957	20,390.83	10,195.42
1958	15,679.41	7,839.71
		Total $237,946.23

Frank Scudder did not seek a redetermination of the Commissioner's assessments and is not an appellant. During the years in question a firm of accountants prepared the annual financial statements of the partnership, listing Frank's involved withdrawals as loans to him. These withdrawals had been so entered upon the partnership books.

[1] "Frank exercised complete control over the affairs of the partnership until the latter part of 1958. He determined his own rate of compensation, supervised recordkeeping, determined the amount of cash distributions to the partners, handled employee problems, and signed the partnership information tax returns pursuant to a power of attorney from the partners." 48 T.C. at 37.

The accountants made copies of these financial statements for delivery to the sister-partners but left it to Frank to make such delivery. He did not do so, and brushed off one sister's request for a copy by telling her that extra copies cost $12.50 each. The same accountants prepared the partnership information returns, correctly reporting the partnership earnings from which Frank's withdrawals had been made. Louise's share of the partnership earnings was accurately shown as taxable income on the joint returns for the years involved. It may be assumed also that Louise's sisters correctly reported and paid income taxes upon their respective shares of the partnership earnings. Thus, except for Frank's taking of fictitious travel expenses and the lower brackets in which the individual partner's share of the earnings would be reported, it would appear that income taxes due were paid upon the monies embezzled or withdrawn by Frank.

In the fall of 1958, Frank's defalcations were discovered. Louise's brother, with the accountants' help, sought to make some repair without letting Louise know of the situation—her delicate health suggested keeping it from her. Frank gave a demand note to the partnership for the amount then calculated to be the total amount of his withdrawals, $268,733, payable on demand with interest at 5%. The note was secured by a mortgage and pledges of various items of real and personal property, which, except for the home of Louise and Frank, was described as being all of Frank's "assets of whatsoever nature, real, personal and mixed." These assets were forthwith transferred to the peartnership, the Owensboro Liquor Company, at an agreed value of $135,470.45, and applied to Frank Scudder's debt to the partnership. While the record is silent on the subject, it may be inferred that Frank Scudder is not now at least, a source from which either his debt to the partnership can be collected or the government's tax claim can be settled.

The record, in fact, does not reveal the present whereabouts of Frank.[2] Thus an affirmance of the Tax Court would visit upon the innocent petitioner payment of $237,946 for taxes and fraud penalties, computed substantially upon money alleged to have been embezzled or taken without authority from her sisters and herself by her husband. This is so even though Frank's repayments have reduced his defalcations to approximately $146,000, an amount about $91,000 less than the tax bill which the Commissioner considered that he was required to extract wholly from one of the victims of the wrong.[3] Of this, the Tax Court's opinion says:

> "Although we have much sympathy for petitioner's unhappy situation *and are appalled at the harshness of*

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[2]The evidence discloses that the marriage of Frank and Louise Scudder was apparently a happy one during the time of his misdeeds. It ended in divorce after the collapse of his discussed enterprises. Louise made an effort to save the marriage by moving away from Owensboro with Frank so that a new start could be made. This effort failed. The Scudders had four children and the Tax Court's opinion and the evidence show that Louise had been in frail health, requiring substantial times of hospitalization for a nervous disorder. She entrusted to her husband the complete control and management of their joint, and her individual, financial matters, signing without question whatever her husband presented to her.

[3]As to the affect of Frank's repayment of $135,470.45, the government's brief says:

> "We do note, however, that in the computation of the deficiency below the taxpayer, as a co-maker of the joint return for 1958, was erroneously not allowed a loss deduction for Frank's partial restitution of $135,470.45 to the partnership on November 17, 1958. See Rev. Rul. 65-254, 1965-2 Cum. Bull. 50. Accordingly, in the event we prevail in this Court, we suggest a remand to the Tax Court for a recomputation of the taxpayer's deficiency taking into account the stated loss deduction."

There is no explanation as to why neither the Commissioner nor the Tax Court took account of this repayment. Neither do we understand the suggestion that it be considered only as a "loss deduction."

> *this result* in the instant case, the inflexible statute leaves no room for amelioration." (Emphasis supplied.) 48 T.C. at 41.

and concluded that:

> "We therefore, *with considerable reluctance,* uphold respondent's determination of deficiencies and additions to tax in their entirety." (Emphasis supplied.) 48 T.C. at 41.

We consider that the Tax Court was overly modest in measuring its own prerogatives and powers when it concluded that "the inflexible statute leaves no room for amelioration."

The bizarre facts before us make this case one of first impression. The Tax Court and the Commissioner apparently felt that the Internal Revenue Code, 26 U.S.C. § 6013 (d)(3)[4] required the action taken, notwithstanding the Tax Court's "considerable reluctance."

> "If a joint return (of husband and wife) is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several."

Answering appellant's position that the law should not tolerate the burdens visited upon her by the Commissioner, the government's brief says:

> "The courts have consistently rejected this position for the same reason which governed the Tax Court decision below—such liability is clearly and unmistakably provided in the Internal Revenue Code and can be set aside only by Congress. See *Howell* v. *Commissioner,* 175 F. 2d 240 (C.A. 6th 1949); *Moore* v. *United States,* 360 F. 2d 353 (C.A. 4th 1965); *Ginsberg's Estate* v. *Commissioner,* 271 F. 2d 511 (C.A. 5th 1959); *Furnish* v. *Commissioner,* 262 F. 2d 727 (C.A. 9th 1958); *Prokop*

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[4] 26 U.S.C. § 6013(d)(3):

v. *Commissioner,* 254 F. 2d 544 (C.A. 7th 1958); *Kann* v. *Commissioner,* 210 F. 2d 247 (C.A. 3d 1953), certiorari denied, 347 U. S. 967 (1954)."

and concludes that the taxpayer can cite no contrary authorities. We agree that the appellant did not, nor are we able to point to any authority which, on the facts of the cases cited above, announced a contrary rule. But we disagree with the government's further position that appellant does not "allege any circumstances *not found* in the above cases." We are aware that among the cases set out above can be found decisions holding that under 26 U.S.C. § 6013(a)(3), a wife's joint and several liability arising from a fraudulent joint return remains, including liability for fraud penalties, even though she had no knowledge of the fraud. The broad rule was succinctly stated by this Court in *Howell* v. *Comm'r.,* 175 F(2) 240 (6th Cir. 1949), where at page 241 we said:

> "The fact that petitioner was not the moving spirit in the fraud is immaterial on the question of her liability."

But none of the cases relied on by the Tax Court contains the factual situation here; none holds that an innocent wife can be held liable for income taxes on monies allegedly embezzled from her by her husband. And none involves a situation where allegedly embezzled funds were shown as loans to the alleged embezzler on the books of the concern from which the withdrawals were made, and upon discovery the alleged embezzler formally recognized his indebtedness for the monies taken by giving his note for the sum taken, and forthwith repayed substantially half of the total debts by transferring to his creditors assets in the amount of $135,470.45; and all of this is accomplished before the Commissioner takes any cognizance of the matter.

The Tax Court appears to recognize that there can be situations where an innocent wife will escape the kind of injustice that the Commissioner appears to be inflicting. It cites *Furnish* v. *Comm'r.*, 262 F(2) 727 (9th Cir. 1958), which holds that if the joint and fraudulent return was signed by the wife only because such signing was the product of duress practiced upon her by her husband, she will not be liable for deficiencies and penalties assessed because of the fraudulent conduct of her husband. In that case, the wife claimed that she merely signed a blank form of return at the insistence of her domineering husband. In remanding the case to the Tax Court for a finding as to whether duress had in fact been practiced on the wife, the Ninth Circuit said:

> "'Duress' may exist not only when a gun is held to one's head while a signature is being subscribed to a document. * * * The actions of the husband in this particular case over a long period of time with all the other facts before the Court, lead us to the conclusion that here there could well have existed duress on the wife sufficient to destroy her free will." 262 F(2) at 733.

We should mention the case of *Nadine I. Davenport*, 48 T.C. 921 (1967), which purports to follow the Tax Court holding in the case at bar, saying:

> "The facts in the instant case are indistinguishable from those in *Louise M. Scudder*, 48 T.C. 36 (1967) * * *"

and concludes that:

> "Here, as in *Louise M. Scudder, supra*, the evidence does not show that the wife's signature was obtained by duress * * * or was obtained *by trickery, nor*

> *does the evidence show any deliberate deception by the husband to induce his wife to sign a joint return with him.*" (Emphasis supplied.) 48 T.C. at 927.

While it may indeed be dictum, the emphasized portion of this quote suggests that "trickery" or "deliberate deception," employed by a husband to obtain his wife's signature to a tax return, will exonerate the victimized wife from the punishment and penalties of the Revenue Code. In its opinion in the case at bar, the Tax Court said:

> "Although we agree that fraud may void a person's signature for purposes of liability on a purported joint return, it seems only logical that the signature must be a product of the fraud. Petitioner has failed to surmount this initial hurdle. Frank was certainly violating the trust and confidence of petitioner by embezzling funds from the partnership of which she was a member, but we cannot relate this breach of duty to the filing of joint returns." 48 T.C. at 40.

The Court, however, indicated that there was no trickery or fraud practiced upon Louise by her husband. The holding of the Tax Court, and other courts, that duress, trickery and fraud practiced upon a wife will, in certain factual contexts, prevent her being subjected to liability of the kind here involved, derives not from language of relevant tax statutes but from the general rules of law and equity. We just cannot persuade ourselves that the executions of the joint returns here were not the product of conduct equivalent in wrong to the fraud, trickery and, indeed, the duress which the Tax Court appears to concede will insulate its victim from liabilities which would otherwise accrue. Running through the cases relied upon by the United States here is also the indication that there the wife had enjoyed the use of the embezzled funds through some spending of them for her benefit. But here the Tax Court found:

> "It is not contended by respondent that petitioner personally benefited, directly or indirectly, from the funds taken by Frank from the partnership."

The Tax Court's opinion contains the observation:

> "It is doubtful whether Frank viewed his unauthorized loans from the partnership as creating taxable income and indeed the Supreme Court did not have such a view of embezzlements throughout the years in question." 48 T.C. at 40.

We do not believe that the case at bar can be adequately discussed or properly decided without consideration of *Comm'r* v. *Wilcox,* 327 U. S. 404 (1946), which held that embezzled monies did not constitute taxable income to the embezzler and of *James* v. *United States,* 366 U. S. 213 (1961) which overruled *Wilcox,* but reversed a conviction of a taxpayer for willful failure to report embezzled funds as income for the years 1951 through 1954, because "the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." 366 U. S. at 221-222.

Both of these cases were decided by divided courts and in *James* there were five separate opinions. Between the two decisions came *Rutkin* v. *United States,* 343 U. S. 130 (1954) which, without a majority of the Court expressly overruling *Wilcox,* held that money obtained by extortion was taxable income to the extortionist. In *Wilcox* the majority of the Court reasoned that embezzled funds did not belong as a matter of right to the embezzler who immediately became indebted to the one from whom he had embezzled for the monies taken. The Court further indicated that the government was incorrect to take its tax preferentially to the defrauded party:

> "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which rightfully and completely belongs to the taxpayer's employer." 327 U.S. at 410.

Respectfully we ponder what the United States Supreme Court would do with the special facts of this case. Although the parties to this action stipulated that Frank's withdrawal of funds constituted "embezzlement," we believe that this issue should not be so summarily dismissed. Frank's withdrawals were shown on the books of the partnership as loans and Frank repaid a portion of them from time to time. When these "unauthorized loans" or "embezzlements" were discovered, Frank executed a partially secured note to the partnership for the agreed upon amount of his withdrawals. The partnership accepted the security in partial payment of the note. Frank remains liable on the balance. There is no evidence that he has been prosecuted for embezzlement or a related crime. It thus appears that the partners, as well as Frank, have, by their conduct, chosen to treat Frank's dealings as unauthorized loans. They were likewise characterized by the Tax Court. If these transactions are so labeled, they do not constitute taxable income to Frank and Louise. *James* v. *United States,* 366 U. S. 213 (1961), while holding that embezzled money is taxable income of the embezzler in the year of embezzlement, specifically excludes loans and situations where there has been recognized an implied obligation to repay:

> "When a taxpayer acquires earnings, lawfully or unlawfully, *without the consensual recognition, express or implied, of an obligation to repay* and without restriction of their disposition, he has received income which he is required to return, even though it may

> still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' *North American Oil* v. *Burnet, supra,* at p. 424. * * * This standard brings wrongful appropriations within the broad sweep of 'gross income'; *it excludes loans.*" 366 U. S. at 219. (Emphasis supplied.)

The precise factual situation in dispute here was considered in neither *Wilcox* nor *James* as, in both those cases, the person who withdrew the funds without authorization was convicted of embezzlement or a related crime.

Under the special facts of this case, we do not consider that a holding by us that the monies withdrawn by Frank Scudder were not taxable income for which his victimized wife must now pay, would run counter to *James* v. *United States, supra.* We believe, of course, that monies received by Scudder from enterprises in which he may have invested some of the allegedly embezzled funds were taxable income which should have been included in the joint returns.

It is impossible for us to make a definitive resolution of the arithmetic involved until we know how the Commissioner will treat and apply the $135,470.45 paid back to the partnership by Frank Scudder. For his advice in reassessing the tax, we hold:

> 1) That no judgment or assessment of deficiencies or penalties which are based either directly or indirectly on Frank Scudder's withdrawals from the partnership, Owensboro Liquor Company, shall be imposed on Louise Scudder.[5]
>
> 2) That in computing the taxes and penalties due on account of unreported income realized from outside

[5]We are aware that Frank's annual withdrawals of amounts falsely labeled travel expense caused inaccuracies in the annual partnership returns. This can be considered upon reassessment.

sources, it shall be determined how much loss deduction may be used by the taxpayer Louise Scudder from the failure of the partnership to recoup the total amount of the withdrawals.

3) That in computing any liability of taxpayer Louise Scudder, proper application shall be made of the said sum of $135,470.45 repaid by the husband, Frank Scudder.

To the extent that our holding may be factually inconsistent with the Tax Court's findings of fact, we hold, obedient to *Comm'r* v. *Duberstein,* 363 U. S. 278 (1960), that its findings are clearly erroneous.

The case is remanded for further consideration consistent with this opinion.

No. 18,041

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOUISE M. SCUDDER, - - - *Petitioner-Appellant,*

v.

UNITED STATES OF AMERICA, - - *Respondent-Appellee.*

ORDER—Filed May 8, 1969.

Before O'SULLIVAN and MCCREE, Circuit Judges, and CECIL, Senior Circuit Judge.

THIS CAUSE is now before the Court upon Respondent-Commissioner's Petition for rehearing and upon a pleading of Louise M. Scudder denominated "Motion to Amend Opinion and in the Alternative Petition for Rehearing." The foregoing petitions and motion are denied.

The Commissioner asserts that our opinion contains an impermissible disregard of a stipulation that monies taken by Frank Scudder from the Owensboro Liquor Company, of which his wife was a partner, constituted embezzlement. This stipulation arose from an agreement between counsel that monies withdrawn from the partnership by Frank "were taken in the manner described in subparagraphs (b) and (e) of paragraph 8 of respondent's answer." Those subparagraphs refer to income that "was derived from a variety of different sources, the most important of which involved his embezzlement of certain funds belonging to a partnership" and that "the total sums which Mr. Scudder

thus unlawfully took and embezzled * * * were not less than the following amounts." Conclusion employment of the word, "embezzlement," where the underlying facts are not in dispute should not change such undisputed facts.

It was, and is, the intent of this Court, moreover, that the end result will be the same whether Frank Scudder's withdrawals from the monies owned by the partnership of which his wife was a member are characterized as unauthorized loans or as embezzlement.

In distinguishing the cases relied upon by the Tax Court, we recited that none of them hold that an innocent wife can be held liable for income tax on monies allegedly embezzled *from her* by her husband. We further distinguished those cases by saying, "And none involves a situation where allegedly embezzled funds were shown as loans to the alleged embezzler on the books of the concern from which the withdrawals were made * * *."

In announcing the basis for our holding, we took occasion to say,

> "We just cannot persuade ourselves that the execution of the joint returns here were not the product of conduct equivalent in wrong to the fraud, trickery, and, indeed, the duress which the Tax Court appears to concede will insulate its victim from liabilities which would otherwise accrue."

After our speculative consideration as to whether the husband's withdrawals might or might not be embezzlement under the language of *James* v. *United States*, 366 U. S. 213 (1961), we expressed our further view that,

> "Under the special facts of this case, we do not consider that a holding by us that the monies withdrawn by Frank Scudder were not taxable income *for which his victimized wife must now pay*, would run counter to *James* v. *United States*, *supra*."

It was, and is, our holding that, whether or no the stipulation of the parties commits us to view the husband's withdrawals as embezzlement, the circumstances by which Frank Scudder obtained these monies forecloses the assessment upon his wronged wife of income tax or penalties thereon.

Appellant Louise M. Scudder moves that this Court's opinion be reformed if it can be read as requiring her to pay the tax due upon income earned by her husband upon investments and properties owned by him, and to "insulate the victim from liabilities on the joint return." This would include exonerating Louise Scudder from payment of the income tax and penalties attributable, not to Frank's partnership withdrawals, but to his other businesses. While some of these investments undoubtedly were made with the funds taken from the partnership, the earnings on them should not be excluded solely because our ruling has already excused her from paying tax on the monies from which the investments were made.[1] In *Commissioner* v. *Wilcox*, 327 U. S. 404, 90 L.Ed. 752 (1946), even though embezzled funds were held not to be taxable income, the Supreme Court suggested that profits realized from use of the embezzled funds might be taxable.

> "Had the taxpayer [the embezzler] used the embezzled money and obtained profits therefrom, such profits might have been taxable, regardless of the illegality involved." 327 U. S. at 410.

We make clear that Louise Scudder's liability for the tax and penalties on such earnings, omitted from the joint return, shall not expose her to any part of the penalty on the amounts illegally withdrawn from the partnership. But we do not look upon the failure of Frank Scudder to include earnings from his investments and properties in

[1]See *Howell* v. *Comm'r*, 175 F. 2d 240 (6th Cir., 1949).

the joint return as "conduct equivalent in wrong to the fraud, trickery, and indeed, the duress" which has led us to hold that Louise is exempt from paying the tax and penalties assessed upon monies illegally withdrawn from the partnership. We make clear, however, that in computing the tax payable on such investment earnings, the wrongfully embezzled or withdrawn funds shall not be added thereto to arrive at the rate of tax.

We further emphasize that the annual withdrawals by Frank Scudder in the amount of $4,420 and falsely entered in the partnership's books as travel expenses are to be treated in the same way as the other illegal withdrawals from the partnership, whether the total be considered as embezzled funds or unauthorized loans or withdrawals.

Therefore, upon consideration of the matters before us,

It Is Ordered that the Motion to Amend Opinion and the respective Petitions for Rehearing may be, and they are, hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss,
Clerk.

McCree, Circuit Judge. (Dissenting in part and concurring in part). Having given further consideration to the issues involved in this appeal, I would grant the petition for rehearing and affirm the decision of the Tax Court.

In light of taxpayer's admission that her husband's withdrawals constituted embezzlements, I do not agree with my brethren that these funds were not embezzled and therefore not income. Moreover, I think that treating the withdrawals as loans ignores the fact that genuine "loans" require the consent of both parties at the time the funds are advanced. There was no agreement between the parties here.

I also think that under the facts of this case taxpayer is jointly and severally liable. Although Congress has not

carved out any exceptions to joint and several liability, the courts have exonerated co-signers of joint returns if their signatures were the product of duress or fraud. Here, however, the Tax Court found that taxpayer voluntarily signed the joint returns and she could not therefore attribute her signature to duress. And any fraudulent conduct by Frank was related to the embezzlement of the funds and not to the procurement of her signature on the joint returns. The unqualified language of the statute therefore compels the imposition of liability.

In all other respects I concur in the original decision of the majority and in its order denying the petitions for rehearing.

48 T. C. 36 (1967)

TAX COURT OF THE UNITED STATES

Docket No. 2736-62

LOUISE M. SCUDDER, - - - - - *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, - *Respondent.*

DECISION—Entered April 18, 1967.

Pursuant to the determination of the Court as set forth in its Findings of Fact and Opinion filed April 17, 1967, it is

Ordered and Decided: That there are deficiencies in income tax and additions to the tax due from the petitioner for the taxable years ended December 31, 1954 through 1958, as follows:

Year	Deficiency	Additions to Tax Sec. 6653(b) 1954 Code
1954.....	$42,718.41	$21,359.21
1955.....	52,842.54	26,421.27
1956.....	23,868.98	16,631.23
1957.....	20,390.83	10,195.42
1958.....	15,679.41	7,839.71

(s) Austin Hoyt,
Judge.

Filed April 17, 1967.

Held: Petitioner is liable for income tax deficiencies and penalties based upon her husband's embezzlements and

other unreported business income during taxable years in which legally effective joint returns were filed.

John S. Hager, for the petitioner.

Gerald W. Fuller, for the respondent.

HOYT, *Judge:* Respondent determined deficiencies in income taxes and additions to the tax for fraud under section 6653(b)[1] against petitioner as follows:

Year	Deficiency	Section 6653(b) Addition
1954	$42,718.41	$21,359.21
1955	52,842.54	26,421.27
1956	23,868.98	16,631.23
1957	20,390.83	10,195.42
1958	15,679.41	7,839.71

At trial we granted petitioner's motion to file an amendment to her reply to respondent's answer. The amendment admitted that Forms 1040 signed and filed by petitioner and her husband for the years 1954 through 1958 were false and fraudulent and that the unreported income of petitioner's husband for the years 1955 through 1958 was correctly determined by respondent. In view of the agreement of the parties and the concessions of petitioner, the only questions remaining for our determination are whether the joint returns filed by petitioner and her husband during the years in issue were legally effective and thus subjected her to joint and several liability, and, if so, whether petitioner's husband received unreported embezzlement income for the year 1954 in the amount of $71,025.28.

FINDINGS OF FACT.

The stipulated facts are found accordingly and adopted as our findings.

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[1] All section references are to the Internal Revenue Code of 1954 unless otherwise indicated.

During the years in issue, Frank E. Scudder (hereinafter referred to as Frank), and Louise M. Scudder (hereinafter referred to as petitioner), were husband and wife residing in Owensboro, Kentucky. Forms 1040 were filed jointly during these years in the names of Frank and Louise Scudder with the district director of internal revenue, Louisville, Kentucky.

Petitioner was a partner with her five sisters in a wholesale liquor business (hereinafter referred to as the partnership), throughout the taxable years in question. Her income from this partnership was $7,799.65 in 1954, $10,22.51 in 1955, $8,218.01 in 1956, $10,466.68 in 1957 and $7,419.15 in 1958. During those years Frank was employed by the partnership as manager. He received wages and a bonus totaling $8,980.74 in 1954, $10,501.25 in 1955, $8,790.53 in 1956, $10,512.59 in 1957 and $8,214.92 in 1958.

Frank exercised complete control over the affairs of the partnership until the latter part of 1958. He determined his own rate of compensation, supervised record keeping, determined the amount of cash distributions to the partners, handled employee problems and signed the partnership information tax returns pursuant to a power of attorney from the partners.

Substantial amounts of partnership funds were taken and used by Frank for his individual purposes in each of the years 1954 through 1958. The money was taken without the knowledge or consent of the partners, and the parties agree that the misappropriations constituted embezzlements. Frank concealed his embezzlement activities from petitioner and the accountants who prepared joint income tax returns for the years 1954 through 1958. Repayments of part of the amounts taken occurred periodically prior to the discovery of Frank's defalcations. The parties are in agreement that the net amounts taken in each year, except for 1954, were as follows:

1954	$71,025.28
1955	83,768.70
1956	56,293.97
1957	33,514.65
1958	37,063.24

Petitioner contends that the net amount taken in 1954 should be only $63,685.79 in lieu of $71,025.28 as determined by respondent.

The embezzlements were concealed by disguising them as loans on partnership information which was furnished to the accountants for preparation of annual financial statements and information returns. Copies of the financial statements were available to the partners, but Frank avoided distributing them by telling one of the partners that the preparation of each copy would cost the partnership $12.50. The embezzlements were discovered in the fall of 1958 when it was learned that the partners had not received copies of the financial statements and an investigation was then made.

Following his admission of the embezzlements, Frank transferred to the partnership in partial restitution assets valued at $135,470.45. This transfer of assets was made by a document dated November 17, 1958.

Petitioner was not informed of her husband's conduct until May or June of 1959. It was feared that an immediate disclosure would jeopardize petitioner's health since she had been suffering from illnesses and emotional disturbances. Petitioner's nervous condition had required hospitalization and extensive medical treatment in 1955.

It was considered to be in the interest of the partnership to retain Frank as a figurehead manager for a period following the discovery of the embezzlements. Frank's position with the partnership was terminated in May or June of 1959 about the time that petitioner was advised by her relatives of Frank's defalcations; it was

decided then that it would be beneficial to her children to move the family to Hopkinsville, Kentucky. The move to Hopkinsville was accomplished and petitioner obtained employment. Petitioner and her husband were separated in 1962 and a divorce was granted in 1963.

It is not contended by respondent that petitioner personally benefited, directly or indirectly, from the funds taken by Frank from the partnership. The partnership sustained a loss due to the embezzlements in the amount of $140,817.95. Petitioner's distributive share of the loss was $21,082.75, of which $6,596.16 was taken as a deduction on her 1959 return. The remaining balance of $14,486.59 was allowed as a net operating loss carryback for the taxable year 1956.

The joint income tax returns filed by Frank and petitioner for the years 1954 through 1958 were prepared from information furnished entirely by Frank. Petitioner never questioned her husband concerning the information on the returns and did not discuss financial matters with him. Petitioner had complete trust and confidence in her husband during this period, and he was well respected in the community. Their marriage was normally happy throughout these years. The question of whether joint income tax returns should be filed was discussed once in 1949. At that time Frank told petitioner that it would be to their advantage to file joint returns. Petitioner continued to sign joint returns without question until she was informed of her husband's embezzlement activities. Subsequent to this time, petitioner filed separate income tax returns even though she was eligible to file joint returns until 1962.

Although most of the tax deficiencies are based on the unreported embezzlement income, Frank also received income from several other sources during the years in question which he failed to report. He received a share of the profits from a number of local business enterprises in which

he was secretly interested. He also failed to report a travel and expense allowance from the partnership which he received each year but did not use for business travel and expenses.

A consent, Form 872, was signed by Frank and petitioner for the taxable year 1957. This action extended the normal limitation period for assessment of 1957 taxes to June 30, 1962. The notice of deficiency was mailed to petitioner on April 13, 1962.

OPINION.

Petitioner's liability for the assessed income taxes and fraud penalties is based upon section 6013(d)(3)[2] which provides for joint and several liability for the tax on the aggregate income where a husband and wife elect to file a joint return. The joint and several liability also applies to fraud penalties despite the innocence of the wife or the husband. W. L. Kann, 18 T.C. 1032 (1952), affd. 210 F. 2d 247 (C.A. 3, 1953), certiorari denied 347 U. S. 967 (1954); Myrna S. Howell, 10 T.C. 859 (1948), affd. 175 F. 2d 240 (C.A. 6, 1949).

Petitioner seeks to avoid liability for the deficiencies on the ground that legally effective joint returns were not filed with Frank for the years 1954 through 1958. Petitioner concedes that she voluntarily signed returns for the years in question with her husband and that valid returns were filed in form. It is argued, however, that joint returns were not filed in substance due to Frank's fraudulent concealment of his embezzlement and other business activities

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[2] SEC. 6013. JOINT RETURNS OF INCOME TAX BY HUSBAND AND WIFE.

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(d) Definitions. * * *

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(3) if a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

from petitioner. The questions presented for our decision, therefore, are whether petitioner was tricked and defrauded by her husband into signing joint returns, and, if so, whether this vitiates the effectiveness of her signature for purposes of joint and several liability on the return.

We have found no case in which the foregoing argument has been exclusively relied upon. There are cases, however, in which wives have attempted to avoid statutory liability on joint returns on the ground that their signatures on the returns were the consequence of duress exerted by their husbands. See Hazel Stanley, 45 T.C. 555 (1966); Irving S. Federbush, 34 T.C. 740, 754-758 (1960), affirmed per curiam 325 F. 2d 1 (C.A. 2, 1963); Estate of Merlin H. Aylesworth 24 T.C. 134 (1955). These cases have interpreted the term "joint return" used in section 6013(d)(3) as not including a return which the wife has been forced to sign because of duress. The legal premise on which this interpretation is based is that legal consequences will not attach to an involuntary act.

It is beyond controversy in the instant case that petitioner signed the returns voluntarily; thus petitioner deprived herself of any basis on which to contend that duress was responsible for her signature. See Hazel Stanley, supra. However, it is petitioner's position that if the concept of duress as used in the law of contracts can relieve a taxpayer from liability on a joint return, the concept of fraud as used in the law of contracts should be capable of having the same effect.

We have previouly held that the inquiry as to whether or not a Federal income tax return is a "joint return" should be conducted under a uniform set of standards. Hazel Stanley, supra. Although we agree that fraud may void a person's signature for purposes of liability on a purported joint return, it seems only logical that the signature must be a product of the fraud. Petitioner has

failed to surmount this initial hurdle. Frank was certainly violating the trust and confidence of petitioner by embezzling funds from the partnership of which she was a member, but we cannot relate this breach of duty to the filing of joint returns. It was clearly advantageous for petitioner and Frank to file joint returns during the years in question since their individual incomes and deductions attributable thereto were never equal. Looking at petitioner and Frank and their children as a family unit, a tax savings was obtained by filing joint returns.

It is doubtful whether Frank viewed his unauthorized loans from the partnership as creating taxable income and indeed the Supreme Court did not have such a view of embezzlements throughout the years in question. See Commissioner v. Wilcox, 327 U. S. 404 (1946). However, it is well settled that the change in the Supreme Court's position expressed in James v. United States, 366 U. S. 213 (1961), is afforded retroactive effectiveness. See Geiger's Estate v. Commissioner, 352 F. 2d 221 (C.A. 8, 1965), affirming a Memorandum Opinion of this Court, certiorari denied 382 U. S. 1012 (1966); Marvin E. Nerem, 41 T.C. 338 (1963). It must be held in this case, therefore, that embezzled funds received during 1954 through 1958 constitute taxable income.

With respect to the other income which Frank failed to report, it would be an exceedingly strained interpretation of the law of fraud for us to hold that he had a duty to disclose this omission to his wife and that failure to do so would constitute fraud sufficient to invalidate the wife's signature. The record before us is devoid of evidence of deliberate deception practiced by Frank to induce petitioner to sign joint returns with him. There is no showing of detrimental reliance on the part of the wife now being held jointly and severally liable on the joint returns.

We think that petitioner has failed to show that her signatures on the joint returns were the product of her

husband's fraud. Thus, we are constrained to hold that petitioner must be subjected to joint and several liability under section 6013(d)(3) on the ground that she filed legally effective joint returns during the years in issue. Although we have much sympathy for petitioner's unhappy situation and are appalled at the harshness of this result in the instant case, the inflexible statute leaves no room for amelioration. It would seem that only remedial legislation can soften the impact of the rule of strict individual liability for income taxes on the many married women who are unknowingly subjected to its provisions by filing joint returns.

This case is an extreme one to be sure, but it illustrates the degree of risk assumed by filing joint returns. It seems extremely harsh that petitioner should be liable for a tax based on money embezzled from the partnership which she and her sisters owned. However, under the terms of the statute, petitioner stands in the shoes of her husband and therefore is individually responsible for any tax deficiency legally applicable to the husband. No other interpretation of the state is rationally permissible of the phrase "liability with respect to the tax shall be joint and several" is to be given its usual and long-accepted meaning in the law.

As to the subsidiary issue with respect to the amount of embezzled income to be included for 1954, the record is extremely vague and confusing and the petitioner's briefs are of little help to clarify the matter. Apparently it is petitioner's view that some repayments made in 1954 of 1953 extractions should be used to reduce the net amount of embezzled income in 1954. The respondent determined that Frank received $71,025.28 but petitioner contends it was only $63,685.79. The evidence before us utterly fails to establish the correct and precise amount Frank took in

1954. The presumption of correctness attaching to respondent's determination has not been overcome.

We therefore, with considerable reluctance, uphold respondent's determination of deficiencies and additions to tax in their entirety.

Decision will be entered for the respondent.